Office - Supreme Court, U.S.
FILED
APR 8 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1441

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ROGER J. KAY, D.O.,

*Appellant,*

v.

THE COMMONWEALTH OF PENNSYLVANIA,

*Appellee.*

---

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

---

# APPELLANT'S REPLY BRIEF

---

PROF. DAVID ARTHUR JONES
University of Pittsburgh
435 Cathedral of Learning
Pittsburgh, PA 15260
412/624-6775
*Attorney for Appellant*

# TABLE OF CONTENTS

Page

I. APPELLEE'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE QUESTIONS PRESENTED HAVE BEEN TIMELY AND PROPERLY RAISED IN THE COURTS BELOW. 1

II. APPELLEE'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE QUESTIONS TO BE REVIEWED ARE SUBSTANTIAL FEDERAL QUESTIONS. 10

III. APPELLEE'S MOTION TO AFFIRM SHOULD BE DENIED BECAUSE THE QUESTIONS TO BE REVIEWED ARE NOT MANIFESTLY UNSUBSTANTIAL. 10

# TABLE OF CASES

Page

*Boykin v. Alabama*,

395 U.S. 238 (1969) ..... 3, 5-7, 12

*Brady v. United States*,

397 U.S. 742 (1972) ..... 3, 5-7, 12

*Carnley v. Cochran*,

369 U.S. 506 (1962) ..... 5-6, 12

*Charlestown Federal Savings and Loan Ass'n. v. Alderson*,

324 U.S. 182 (1945) ..... 8, 15-16

*Commonwealth v. Kay*,

478 A.2d 1366 (Pa.Super.1984) .. 4, 15

*Cramp v. Board of Public Instruction*,

366 U.S. 934 (1960) ..... 10

*Duncan v. Tennessee*,

405 U.S. 127 (1972) ..... 12

*Knapp v. Schweitzer*,

355 U.S. 804 (1957) ..... 10

*McCarthy v. United States*,

394 U.S. 459 (1969) 3, 5-7, 12

*McMann v. Richardson*

397 U.S. 759 (1970) ..... 12

Page

*Moon v. Maryland*

398 U.S. 319 (1970) ..... 12

*New York ex rel. Bryant v. Zimmerman*

278 U.S. 63 (1928) ..... 6-7

*Saltonstall v. Saltonstall*

276 U.S. 260 (1928) ..... 3

*Strickland v. Washington*

466 U.S. ___, 104 S.Ct. 2052 (1984) 12

*United States v. Cantor*

469 F.2d 435 (3rd Cir. 1972) ..... 3

*United States v. DeCavalcante*

449 F.2d 139 (3rd Cir. 1971) ..... 3

*United States v. White*

401 U.S. 745 (1971) ..... 14

*Vachon v. New Hampshire*

414 U.S. 478 (1974) ..... 9

*Webb v. Webb*

451 U.S. 493 (1981) ..... 2, 7, 9

*Wood v. Georgia*

450 U.S. 261 (1981) ..... 9, 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

---

No. 84-1441

---

ROGER J. KAY, D.O.,

*Appellant,*

v.

THE COMMONWEALTH OF PENNSYLVANIA,

*Appellee.*

---

# REPLY BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM AND TO DISMISS

---

## I. APPELLEE'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE QUESTIONS PRESENTED HAVE BEEN TIMELY AND PROPERLY RAISED IN THE COURTS BELOW.

Without question, this Court possesses jurisdiction on appeal usually where the

questions presented have been timely and properly raised in the courts below. See 28 U.S.C. § 1257(b); S.Ct.R. 16(b); *Webb v. Webb*, 451 U.S. 493 (1981). The test is whether "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. 451 U.S. 493,497-498. It was in this case, as the record shows.

Appellant first objected to evidence obtained via eavesdropping and wiretapping at the Probable Cause Hearing held on December 14, 1981, his first day in court on the charges in question. J.S. at 6. Then, despite the tender of a guilty plea on or about May 3, 1982, Appellant moved *before* sentencing on or about March 18, 1985 for withdrawal of that guilty plea on grounds that "Neither a knowing, understanding (intelligent), and voluntary guilty plea, nor a factual basis for the same, is supported by 'Record Adequacy.'" See Brief

for Appellant at 3-4, 6-7, 478 A.2d 1366 (Pa.Super. 1984). Argument II before the Superior Court of Pennsylvania relied completely upon *Boykin v. Alabama*, 395 U.S. 238 (1969) and *McCarthy v. United States*, 394 U.S. 459 (1969). Brief for Appellant at 13-22, 478 A.2d 1366 (Pa.Super. 1984). Argument IV before the Superior Court relied substantially upon *Brady v. United States*, 397 U.S. 742 (1970) and several lower Federal court decisions: *United States v. Cantor*, 469 F.2d 435 (3rd Cir. 1972) and *United States v. DeCavalcante*, 449 F.2d 139 (3rd Cir. 1971). Brief of Appellant at 28-32, 478 A.2d 1366 (Pa.Super. 1984). Thus, clearly Appellant challenged Pennsylvania's guilty plea tender procedures under *Federal* law.

What is most important, as this Court has expressed, is that "the state court understood that the federal Constitution was the basis for the objection...." *Saltonstall v. Saltonstall*, 276 U.S. 260,267-268

(1928).

As further evidence that Appellant's arguments were timely and properly raised before the Superior Court of Pennsylvania, that court itself recited Appellant's arguments within its reference to facts presented:

> The appellant presents four arguments for our review. First, he contends the trial court erred in not allowing him to withdraw his guilty plea prior to sentencing because he did not enter it knowingly and intelligently and because there is inadequate record evidence to indicate he did. *Commonwealth v. Kay*, ___ Pa.Super. ___, 478 A.2d 1366,1368 (1984).

Thus, the Superior Court did address these Federal questions. Then, the Pennsylvania Superior Court resolved the dilemma:

> What plea to enter must be a decision by the accused which is voluntarily and intelligently made. ... Pa.R.Crim.P. 319 outlines a procedure to be followed that will assure the guilty plea is voluntarily tendered. No more than the inquiries outlined in Pa.R.Crim.P. 319 is required. *Id.*

Therefore, *sub silentio*, the Superior Court

upheld Appellant's challenge to Rule 319 under the *Brady*, *Boykin*, and *McCarthy* decisions of this Court upon which Appellant had relied in his Superior Court brief.

The Superior Court went even further by rationalizing:

> All that preceded the entry of appellant's plea fully apprised him of the nature of the charges and the rights available to him. Nothing in the record indicates the appellant entered his guilty plea unknowingly or involuntarily. *Id.*

Needless to say, the Superior Court thus raised the salient question herein: Was Appellant fully apprised of the charges and of his rights? He denies that he was.

But it is less what things "in the record" indicate than what may be absent from the record, which is paramount. As this Court noted a generation ago:

> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered [information or a right] but in-

> telligently and understandingly waived it. Anything less is not waiver. *Carnley v. Cochran*, 369 U.S. 506,516 (1962).

And that is precisely what the Pennsylvania courts did: they presumed "waiver" because "nothing in the record indicate[d] otherwise; and they justified this practice on Pa.R.Crim.P. 319 notwithstanding that Appellant had challenged this logic under Federal law expressly in his brief.

The Superior Court of Pennsylvania never once mentioned *Brady*, *Boykin*, *McCarthy*, or any other Federal law or decision with its opinion affirming Appellant's conviction. Yet, this Court has reasoned that a lower court need not do so as a condition-precedent to conferring appellate jurisdiction upon this Court:

> Of course the decision must be against the claim ..., but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63,67(1928).

It is worthy of note that this Court recently cited *Bryant v. Zimmerman* in *Webb v. Webb.*, *supra*, at 497. The Appellee has relied on *Webb* in support of its Motion to Dismiss this appeal because Federal questions contained herein were untimely or improperly raised. Appellee's Brief at 15.

The same Federal issues were preserved before the Supreme Court of Pennsylvania, where Appellant, within his Petition for Allowance of Appeal restated each Federal argument he had advanced before the Superior Court of Pennsylvania, including arguments under *Boykin*, *Brady*, *McCarthy*, and other Federal decisions. Brief of Petitioner at 10-11, 16-17, 20, ___ Pa. __, ___ A.2d ___ (1984). The Supreme Court refused without opinion to consider Appellant's case.

This Court has adopted the posture that "[w]here is appears from the opinion of a state court ... that a state statute

was drawn into question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. *For we need not inquire how and when the question of the validity of the statute was raised* when such question appears to have been actually considered and decided [below]. *Charlestown Federal Savings and Loan Ass'n. v. Alderson*, 324 U.S. 182, 185-186 (1945). (Emphasis added).

That the Federal questions had been presented before the Superior Court, and *without* objection by Appellee at that time as being untimely or improper, is evident from Appellee's having addressed on the merits Appellant's state of mind when the guilty plea was tendered:

> Kay testified at his plea withdrawal hearing that he had been "very nervous" at the time of his plea; that "I was instructed to sign the document"; that "I don't remember reading it myself" (the plea rights sheet); that he "answered all the questions in a very harried fashion, without regard to pleading guilty,

> he "didn't make a decision, (he) acted in blind faith"; and didn't remember he was "fully conscious of what was said because my mind was someplace else." Brief of Appellee at 11, 478 A.2d 1366 (1984) citing N.T. 66,68, 70-71, 74.

Even if, for whatever reason, it may be concluded that Appellant raised issues under the Federal Constitution and/or law in an untimely fashion, this Court has reaffirmed recently its power to review any *plain error* even if unchallenged by the Appellant in the state courts, where deemed necessary to prevent *fundamental unfairness*. *Wood v. Georgia*, 450 U.S. 261,265,n,5 (1981); *accord, Vachon v. New Hampshire*, 414 U.S. 478 (1974). *Wood* was cited favorably in *Webb v. Webb, supra*, at ___, 101 S.Ct. 1889,1894. (Concurring opinion of Powell, J.). *Webb* has been relied upon by the Appellee.

At the very least, this Court should postpone final consideration of the question of jurisdiction until a hearing can be held on the merits of Appellant's case, as

this Court has done previously under similar circumstances. See *Cramp v. Board of Public Instruction*, 366 U.S. 934 (1960). Or instead, the Court might dismiss the appeal but grant *certiorari*, particularly in view of the *fundamental fairness* issues Appellant has raised. See *Knapp v. Schweitzer*, 355 U.S. 804 (1957). In any event, for this Court simply to dismiss the appeal or for it to affirm the conviction would be unfair.

II. APPELLEE'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE QUESTIONS TO BE REVIEWED ARE SUBSTANTIAL FEDERAL QUESTIONS.

III. APPELLEE'S MOTION TO AFFIRM SHOULD BE DENIED BECAUSE THE QUESTIONS TO BE REVIEWED ARE NOT MANIFESTLY UNSUBSTANTIAL.

In order for this Court to affirm the

lower court judgment, pursuant to Rule 16. 1(c) of this Court's Rules, this Court has to be convinced that the Appeal manifestly presents questions that are so unsubstantial as not to need further argument. Such is hardly the situation in the instant case, and certainly not for the reasons proffered by the Appellee, whose argument has not proceeded beyond the fact that the Supreme Court of Pennsylvania denied judicial review. Motion to Affirm at 21.

Nor is Pa.R.A.P. 1114 illuminating to this Court, as the Appellee has contended. Rule 1114 is a state rule of procedure and, consequently, not of concern to this Court. That Rule 1114 permits *state* judicial review "only when there are special and important reasons therefore" does not control and should not be equated with provisions of this Court's Rule 16.1(c). A question might be "substantial" but not "special" or "important" under Pennsylvania's Rule 1114.

Far from being unsubstantial, the Appellant's questions would appear to be exceptionally substantial, or so this Court has agreed on many previous occasions. As to the plea tender questions, their significance has been expounded masterfully by this Court in *Boykin*, *Brady*, *Carnley*, and *McCarthy*, *supra*, *inter alia*. Clearly the issues passed upon by this Court in those cases were not mooted as being unsubstantial under *Duncan v. Tennessee*, 405 U.S. 127 (1972) or *Moon v. Maryland*, 398 U.S. 319 (1970) or earlier cases from which *Duncan* and *Moon* were derived.

Nor does *Strickland v. Washington*, 466 U.S. ___, 104 S.Ct. 2052 (1984) appear to render unsubstantial the question of the effectiveness of Appellant's trial counsel, as Appellee seems to contend in its Brief at 19. Some time ago, this Court noticed in *McMann v. Richardson*, 397 U.S. 759 (1970) that a defendant's guilty plea must be one

"based on reasonably competent [legal] advice to be intelligent and valid. *Id.* at 770. *Strickland* would not appear to change that standard materially. For one reason, the defendant in *Strickland* tendered his plea over objections of his counsel, while the Appellant followed counsel's advice. Secondly, the Court found that the error complained of in *Strickland* could not have affected the judgment of conviction at all, which cannot be true of Appellant's case. Finally, but most saliently, this Court found that the sentencing proceeding that *Strickland* stemmed from was not fundamentally unfair, whereas Appellant's would seem to be fundamentally unfair *on the totality of the circumstances*. For instance, nowhere in the record of Appellant's case could Appellee have introduced evidence more harmful than the evidence already admitted. Nor are "overwhelming aggravating circumstances" apparent in Appellant's case such as

they appear in *Strickland*. 466 U.S. ___ at ___; 80 L.Ed.2d 674 at 701.

This Court reasoned in *Strickland* that one test measuring the significance of ineffective counsel is whether, but for the ineffectiveness, a different outcome would be a reasonable probability; and it explained that a "reasonable probability" is a probability sufficient to undermine confidence in the outcome." *Id.* at ___; 80 L.Ed.2d 674 at 698. This would appear to square with the *fundamental fairness* test referenced by this Court in *Wood v. Georgia*, *supra*. If so, Appellant would seem to have a "reasonable probability" of acquittal at trial should he be permitted to withdraw the guilty plea and suppress fruits of unlawful electronic surveillance which this Appellant's trial counsel failed even to attempt to suppress, relying upon an erroneous interpretation of *United States v. White*, 401 U.S. 745 (1971). See Brief of Appellee

at 22, 478 A.2d 1366 (1984).

Indeed, the Superior Court of Pennsylvania considered Appellant's challenge to The Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. C.S. § 5704(2)(i), and ruled that Appellant's attorney's "decision that a suppression motion would not be successful has a clear basis in the law" because it is "not ... unlawful ... for ...[a]ny investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire or oral communication involving suspected criminal activities [as long as] such officer or person is a party to the communication." *Commonwealth v. Kay*, *supra*, at ___; 478 A.2d 1366 at 1368. Thus, the Superior Court having considered this issue, Appellant's challenge to this Pennsylvania statute is properly before this Court under *Charlestown Federal Savings & Loan*

*Assoc. v. Alderson, supra,* at 185-186. Nor is the question of the constitutionality of Pennsylvania's Eavesdropping / Wiretapping statute unsubstantial, inasmuch as without clear guidance from this Court, defense counsel such as Appellant's trial counsel will predictably continue to avoid a challenge to such statutorily-approved warrantless searches and seizures, relying, as Appellee has done, upon the views expressed or implied by the Pennsylvania courts:

> The lack of merit of the issue is best viewed in noting that the Pennsylvania Supreme Court denied review in a simple per curiam order... . Brief of Appellee at 21.

If the Supreme Court of Pennsylvania has the last word on whether a statute is repugnant to the Constitution, then this Court will have failed to meet the imperative duty conferred upon it by Article III of the United States Constitution, for it should be apparent that none of the quest-

ions Appellant has raised via this appeal can properly rest on an adequate state or non-federal basis, nor has the Appellee offered any authority supporting this contention.

## CONCLUSION

This Court should deny the Appellee's Motions to Affirm and Dismiss, or, at the very least, it should postpone final consideration of the jurisdictional question until the hearing on the merits. Alternatively, this Court might grant *certiorari* and review one or more of the questions, because these questions involve *fundamental fairness*.

Respectfully submitted,

DAVID ARTHUR JONES